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Bill Analysis

Version: As Pending in House State and Local Government

Primary Sponsors: Reps. Wiggam and Edwards

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SUMMARY

- Permits the General Assembly to rescind orders and emergency declarations issued by the Governor and certain orders issued by the Ohio Department of Health (ODH), and to invalidate emergency rules adopted by any state agency.
- Terminates certain executive orders after 30 days unless extended by the General Assembly.
- Establishes the Ohio Health Oversight and Advisory Committee, and grants the Committee the power to rescind certain orders and rules issued by the Governor, ODH, and other agencies.
- Limits the duration of a state of emergency to 30 days unless extended by the General Assembly.
- Limits the duration of emergency rules issued by an agency in response to a public health state of emergency to 30 days unless extended by the General Assembly.
- During a public health state of emergency, requires the Governor and ODH to report to the President of the Senate and the Speaker of the House of Representatives any actions taken in response to the emergency.
- Subjects existing orders and emergency declarations issued by the Governor and certain existing orders and rules issued by ODH to review and rescission by the General Assembly and the Committee.
- Terminates existing executive orders issued by the Governor, certain existing orders and rules issued by ODH, and rules adopted, amended, or rescinded by a state agency on an emergency basis, in response to a public health state of emergency 30 days after the bill's effective date unless extended by the General Assembly.

DETAILED ANALYSIS

General Assembly may rescind Governor orders

The bill allows the General Assembly to rescind any executive order issued by the Governor by passing a concurrent resolution. After the General Assembly rescinds an order, the Governor is prohibited from reissuing the order (or a substantially similar order) for 90 days. If the Governor attempts to reissue an order that was rescinded – or issues a substantially similar order to one that was rescinded – the order is invalid and has no legal effect.¹

General Assembly may rescind certain ODH orders or rules

The bill also allows the General Assembly to rescind a special or standing order or rule for preventing the spread of contagious or infectious disease issued by the Ohio Department of Health (ODH), by passing a concurrent resolution. After the General Assembly rescinds a special or standing order or rule, ODH is prohibited from reissuing the special or standing order or rule (or a substantially similar special or standing order or rule) for 90 days. If ODH attempts to reissue a special or standing order or rule that was rescinded – or issues a substantially similar special or standing order or rule to the one that was rescinded – the special or standing order or rule is invalid and has no legal effect.²

General Assembly may invalidate certain agency emergency rules

The Administrative Procedure Act (APA) currently permits the Governor, at the request of an agency, to determine that an emergency exists that requires the immediate adoption, amendment, or rescission of a rule. In this event, an agency is permitted to take action to immediately adopt, amend, or rescind a rule, without that action being reviewed by the Joint Committee on Agency Rule Review (JCARR).³ Current law also permits the adoption of rules that are not subject to the APA on an emergency rule if the agency finds it necessary for the immediate preservation of the public peace, health, or safety. Similar to emergency rules under the APA, an emergency rule adopted by an agency under this process is not subject to review by JCARR.⁴ In both circumstances, an emergency rule becomes invalid at the end of the 120th day it is in effect. The bill limits the adoption, amendment, or rescission of a rule in response to a public health state of emergency (see “**Public health state of emergency**,” below) to 30 days, unless the adoption, amendment, or rescission is extended by the General Assembly by adopting a concurrent resolution.

¹ R.C. 107.43(C)(1) and (D).

² R.C. 3701.13(C)(2), (3), and (4). The bill also makes technical changes to this section for organizational purposes.

³ R.C. 119.03(G)(1).

⁴ R.C. 111.15(B)(2).

The bill allows the General Assembly to invalidate an emergency rule amended or adopted by an agency, or to authorize a rule rescinded by an agency to be reinstated.⁵ After the General Assembly invalidates an emergency rule, an agency is prohibited from readopting the invalidated rule (or a substantially similar rule) for 90 days. If an agency attempts to reissue an emergency rule that was invalidated – or issues a substantially similar emergency rule to the one that was invalidated – the emergency rule is invalid and has no legal effect.⁶

Ohio Health Oversight and Advisory Committee

The bill establishes the Ohio Health Oversight and Advisory Committee. The Committee consists of ten members. Five members of the Senate (three from the majority party and two from the minority party) are to be appointed by the President of the Senate, and five members of the House of Representatives (three from the majority party and two from the minority party) are to be appointed by the Speaker of the House of Representatives.⁷ When appointing Committee members from the minority party, the President and Speaker must consult with the minority leader from their respective houses.

The bill requires initial appointments to the Committee to be made within 15 days after the bill's effective date. Thereafter, appointments to the Committee occur every two years, not later than 15 days after the commencement of the first regular session of each General Assembly. A member appointed to the Committee serves until appointments are made in the next General Assembly, unless the member is removed by the President or Speaker. Members of the Committee may be reappointed.⁸

In odd-numbered years, the President must appoint a member of the Committee from the Senate who is a member of the majority party to serve as the Committee chairperson, and the Speaker must appoint a member of the Committee from the House who is a member of the minority party to serve as the Committee ranking minority member. In even-numbered years, the Speaker must appoint a member of the Committee from the House who is a member of the majority party to serve as the Committee chairperson, and the President must appoint a Committee member from the Senate who is a member of the minority party to serve as the Committee ranking minority member.⁹ The Committee meets at the call of the chairperson.¹⁰

In addition to its powers during a public health state of emergency (see “**Public health state of emergency**,” below), the Committee is authorized to oversee actions taken by ODH to prevent the spread of contagious or infectious diseases and may, at any time, by a majority vote, rescind a special or standing order or rule for preventing the spread of

⁵ R.C. 106.022, 107.43(C)(2), 111.15(B)(2), and 119.03(G)(3).

⁶ R.C. 107.43(D).

⁷ R.C. 103.65(A).

⁸ R.C. 103.65(B).

⁹ R.C. 103.65(C).

¹⁰ R.C. 103.65(E).

contagious or infectious diseases issued by ODH under R.C. 3701.13.¹¹ If the Committee rescinds a special or standing order or rule, ODH is prohibited from reissuing the special or standing order or rule (or a substantially similar special or standing order or rule) for 90 days. If ODH attempts to reissue a special or standing order or rule that was rescinded – or issues a substantially similar special or standing order or rule to the one that was rescinded – the special or standing order or rule is invalid and has no legal effect.¹²

To assist the Committee in performing its duties, including those duties described below, the bill permits the Committee chairperson to issue subpoenas. Before issuing subpoenas, the Committee chairperson must receive authorization from the Committee, the President, and the Speaker.¹³ The bill requires the executive director and staff of the Joint Medicaid Oversight Committee to serve the Committee to enable it to successfully and efficiently perform its duties.¹⁴

State of emergency

The bill limits the duration of a state of emergency declared by the Governor, including a public health state of emergency (see “**Public health state of emergency**,” below). A state of emergency may last only 30 days unless the General Assembly passes a concurrent resolution to extend the emergency. There is no limit to the number of extensions the General Assembly may provide, but each extension cannot exceed 60 days. If the General Assembly does not extend a state of emergency, the Governor is prohibited from reissuing that emergency, or a substantially similar emergency, for 90 days after the state of emergency ends.¹⁵

The bill also allows the General Assembly to rescind an emergency declaration issued by the Governor (no matter the method used to declare the emergency) by adopting a concurrent resolution. After the General Assembly rescinds a declaration, the Governor is prohibited from reissuing the declaration (or a substantially similar declaration) for 90 days. If the Governor attempts to reissue a declaration that was rescinded – or issues a substantially similar declaration to one that was rescinded – the declaration is invalid and has no legal effect.¹⁶

Public health state of emergency

Some of the bill’s provisions apply only during a “public health state of emergency,” which the bill defines to mean an emergency for which the Governor declares an emergency in response to a threat to the preservation of the life and health of Ohioans.¹⁷ This includes the

¹¹ R.C. 103.651(D).

¹² R.C. 103.651(E).

¹³ R.C. 103.651(B)(2).

¹⁴ R.C. 103.65(F).

¹⁵ R.C. 107.43(A).

¹⁶ R.C. 107.43(C)(1).

¹⁷ R.C. 107.42.

three current types of emergencies the Governor has specific statutory authority to declare: an air pollution emergency, an energy shortage emergency, and an adulterated consumer product emergency.¹⁸

During a public health state of emergency:

- The Governor and ODH are required to report to the President and Speaker every action the Governor or ODH take in response to the emergency.¹⁹
- The Committee may oversee actions taken by the Governor and ODH.²⁰
- The Committee may consult with and provide advice to the Governor and ODH regarding necessary and appropriate actions.²¹
- Beginning on the 11th day of the emergency, the Committee may rescind any executive order issued by the Governor in response to the emergency, including the emergency declaration.²²
- Following the adoption, amendment, or rescission of a rule on an emergency basis by an agency in response to a public health state of emergency, the Committee may invalidate a rule adopted or amended, or authorize a rescinded rule to be reinstated.²³

If the Committee rescinds an executive order or emergency declaration, the Governor is prohibited from reissuing the order or declaration (or a substantially similar order or declaration) for 90 days. If the Governor attempts to reissue an order or declaration that was rescinded – or issues a substantially similar order or declaration to one that was rescinded – the order or declaration is invalid and has no legal effect. Likewise, if the Committee invalidates an emergency rule, the agency is prohibited from readopting the emergency rule (or a substantially similar emergency rule) for 90 days. If an agency attempts to readopt an emergency rule that was invalidated – or issues a substantially similar emergency rule to one that was invalidated – the emergency rule is invalid and has no legal effect.²⁴

In addition, the bill terminates any executive order issued by the Governor related to a public health state of emergency after 30 days (except an executive order to declare the emergency; see “**State of emergency**,” above). The General Assembly may adopt a

¹⁸ R.C. 3704.032, not in the bill; R.C. 4935.03 (currently may last up to 30 days, but can be extended by the Governor; General Assembly can terminate the emergency at any time with a concurrent resolution), and R.C. 3715.74 (currently may last up to 90 days unless extended by General Assembly via concurrent resolution), respectively.

¹⁹ R.C. 107.42 and 3701.13(C)(5).

²⁰ R.C. 103.651(B)(1)(a).

²¹ R.C. 103.651(B)(1)(c).

²² R.C. 103.651(C).

²³ R.C. 103.651(C)(2) and (3).

²⁴ R.C. 103.651(E).

concurrent resolution to extend an executive order beyond 30 days.²⁵ This provision applies to executive orders in effect on the effective date of the bill; they are terminated 30 days after the bill takes effect, unless extended by the General Assembly. Similarly, any rule adopted, amended, or rescinded on an emergency basis by an agency in response to a public health state of emergency, including those in effect on the bill's effective date, expire in 30 days unless extended by the General Assembly.²⁶

Review and rescission applies to existing orders and rules

The bill provides that any executive order or emergency declaration issued by the Governor, or any special or standing order or rule for preventing the spread of contagious or infectious disease issued by ODH under R.C. 3701.13, that is in effect on the bill's effective date, is subject to review and rescission by the General Assembly and by the Committee.²⁷

ODH authority

The bill specifies that a special or standing order or rule for preventing the spread of contagious or infectious diseases issued under R.C. 3701.13 expires in 30 days unless it is extended by the General Assembly by adopting a concurrent resolution.²⁸ This includes orders in effect on the bill's effective date; they expire 30 days after that date.²⁹

The bill removes the word "ultimate" from existing law describing ODH's authority over matters of quarantine and isolation.³⁰ The bill also defines the terms quarantine and isolation as they relate to ODH's authority. "Isolation" is defined as "the separation of one or more individuals who have been medically diagnosed with a communicable or contagious disease from other individuals who have not been medically diagnosed with the disease." "Quarantine" is defined as "the separation or restriction of movement of one or more individuals who have come into direct contact with someone who has been medically diagnosed with a communicable or contagious disease."³¹

COMMENT

The provisions allowing the General Assembly and Committee to rescind orders of the Governor or ODH by concurrent resolution might be vulnerable to a constitutional challenge on the grounds that the legislature cannot take such an action by resolution or by vote of a joint committee. The Ohio Constitution specifies that, "The General Assembly shall enact no law

²⁵ R.C. 107.42.

²⁶ R.C. 106.022, 111.15, 119.03, and 3701.13; Section 3.

²⁷ Section 3.

²⁸ R.C. 3701.13(C)(1).

²⁹ Section 3.

³⁰ R.C. 3701.13(B)(1).

³¹ R.C. 3701.13(A).

except by bill.” In interpreting that provision, the Ohio Supreme Court has ruled that a joint resolution cannot have the effect of law.³² A reviewing court might find that the General Assembly, directly or via joint committee, cannot take an action with legal effect – such as rescinding an order of the Governor or ODH – except by passing a bill, which must be presented to the Governor for approval and which, unless an exception applies, is subject to the referendum. This concept is parallel to one found in the U.S. Constitution with respect to Congress. The U.S. Supreme Court similarly has ruled that Congress cannot overrule a determination of an executive official by passing a resolution.³³

In addition, some might examine the provisions with respect to the constitutional principle of separation of powers.³⁴ The Constitution gives the General Assembly the power to enact laws, but gives the Governor the power to execute them.³⁵ A reviewing court might find the bill attempts to give the General Assembly a legislative veto power – that is, the authority to both make the law allowing the Governor or ODH to issue orders, and the authority to determine how that law is enforced by rescinding the Governor’s or ODH’s orders via resolution rather than bill. Ohio’s courts appear not to have addressed this specific issue, but the U.S. Supreme Court and courts in several other states have ruled legislative veto laws unconstitutional on this basis. The U.S. Supreme Court has stated that, “once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly – by passing new legislation.”³⁶

³² Ohio Constitution, Article II, Section 15 and *Cleveland Terminal and Valley Railroad Company v. State*, 85 Ohio St. 251, 281 (1912). See also Ohio Const., art. II, secs. 1c and 1d and art. XVI, sec. 1. The Ohio Constitution specifically allows legislative action by resolution in some cases, such as to place a constitutional amendment on the ballot.

³³ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 956 (1983).

³⁴ While no provision of the Constitution explicitly states the principle of separation of powers, according to the Ohio Supreme Court, “this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *South Euclid v. Jemison*, 28 Ohio St.3d 157, 158 (1986).

³⁵ Ohio Const., art. III, sec. 6.

³⁶ *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). See also *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769 (Alaska 1980); *General Assembly of New Jersey v. Byrne*, 90 N.J. 376 (1982); *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45 (1984); *Commonwealth v. Sessoms*, 516 Pa. 365 (1987); *State ex rel. Meadows v. Hechler*, 195 W. Va. 11 (1995); *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. 1997); and *Blank v. Department of Corrections*, 462 Mich. 103 (2000).

HISTORY

| Action | Date |
|------------|----------|
| Introduced | 02-09-21 |
